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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 717

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners, Aluminum Company of America, Crown Central Petroleum Corporation, and Pocantico Oil & Gas Corp. pray that a writ of certiorari issue to review the judgment of the Supreme Court of Texas (App. B), which affirmed the judgment of the District Court of Travis County, 53rd Judicial District of Texas (App. A), in a direct appeal by the Railroad Commission of Texas and by these Petitioners from that judgment. The judgment of the District Court granted the motion for summary judgment filed by the Respondents Woods Exploration & Producing Company, Inc. and Southeastern Pipeline Company, as plaintiffs, and by the Respondents Ben Novak, Claire Benz-Stoddard, and Lumar Gas Corporation, as intervener plaintiffs, and decreed against the Petitioners and against the Railroad Commission of Texas, as defendants, that the ruling of the Railroad Commission and the formal order of the Railroad Commission adopting a new procedure for determining the maximum limit on the monthly reservoir production allowables for five gas reservoirs in the Appling Field in

Calhoun County, Texas, was not within the statutory authority of the Railroad Commission under Sections 10, 11, and 12, Article 6008, R.C.S. of Texas, that such order placing a maximum limit on such field allowables was null and void, and that the defendant Railroad Commission of Texas was permanently enjoined from enforcing or attempting to enforce said order.

In affirming the judgment of the District Court the majority of the Supreme Court of Texas found that prior to adoption of the invalidated order the Respondents, as operators of small tract or town lot wells, were draining vast quantities of gas from the lands of Petitioners as owners of large tract gas wells in the same field by means of the ⅓-⅔ individual well allocation formula adopted by the Railroad Commission of Texas for the field (which divided the reservoir allowable on the basis of ⅓ to the well and ⅔ to the acreage on which the well was situated), as well as by means of draining gas from Petitioners' underlying gas reservoir through well bore communication between such underlying reservoir and overlying, depleted reservoirs in Respondents' wells having multiple completions in different reservoirs in the same well bore (App. D, p. 9a-11a). The majority opinion conceded that this enables the Respondents to produce *"far more* of the reservoir allowable *than their share* as determined by the basic ⅓-⅔ allocation formula, and the *drainage advantage which the small tract operators already enjoy by virtue of the formula itself was thus substantially enhanced"* (App. D, p. 10a) (Emphasis supplied.), but held that Section 12 of Article 6008 nevertheless precluded the Railroad Commission of Texas from limiting this confiscation by placing a ceiling on the reservoir allowables through a formula providing that the reservoir allowable should not exceed an amount under which the best well in the field if located on the

largest tract would be able to produce its individual well allowable received by it under the ⅓-⅔ allocation formula.

Opinions Below

A copy of the judgment of the District Court of Travis County, 53rd Judicial District of Texas, entered without written opinion, is copied herein as Appendix A. The judgment of the Supreme Court of Texas is copied herein as Appendix B, and the Order of that Court denying Petitioners' Motion for Rehearing is copied herein as Appendix C. The majority opinion of the Supreme Court of Texas is copied herein as Appendix D. The dissenting opinion of Mr. Justice Smith, in which Mr. Justices Hamilton and Norvell joined, is copied herein as Appendix E. The dissenting opinion of Mr. Justice Hamilton, in which Mr. Justices Smith and Norvell also joined, is printed herein as Appendix F. These opinions are reported as *Railroad Commission of Texas, et al* v. *Woods Exploration and Producing Company, Inc., et al,* 405 S.W. 2d 313 (Tex. 1966).

Jurisdiction

The judgment of the Supreme Court of Texas sought to be reviewed was dated and entered on June 22, 1966 (Appendix B). The motion for rehearing of Petitioners and Railroad Commission of Texas was timely filed on June 29, 1966. The order of the Supreme Court of Texas denying the motion for rehearing filed by the Railroad Commission of Texas and by these Petitioners was entered on July 27, 1966 (Appendix C). The Supreme Court of Texas further entered an order on August 10, 1966, staying the issuance of mandate in this case and the execution and enforcement of judgment therein for a period of 90 days from July 27, 1966 (Appendix G).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) since the validity of § 12 of Art. 6008, the gas proration statute of the State of Texas, as applied in this action is drawn in question on the ground of its being repugnant, as applied in this action, to the equal protection of the laws and the due process of law clauses of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether a Texas Supreme Court majority decision invalidating an order of the Texas Railroad Commission found necessary to protect the correlative rights of Petitioners in a common gas reservoir and to prevent the admitted confiscation of Petitioners' gas by Respondents on the ground that such order was violative of and beyond the powers of the Commission under Section 12 of Article 6008, Texas Revised Civil Statutes (1962), construes and applies such statute so as to deny Petitioners the equal protection of the laws and to take Petitioners' property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Constitutional Provisions and Statutes Involved

Those provisions of Article 6008, Revised Civil Statutes of Texas, which are pertinent here are as follows:

> "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.
>
> . . .

Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interest:

(a) In the prevention of waste as 'waste' is defined herein;

(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

"Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of

each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month.

* * *

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law.

* * *

"Sec. 26. If any section or sections, clause, sentence or provision of this Article should, for any reason, be held to be invalid or unconstitutional, it shall not affect in anywise the remaining parts of this Article, not so held, and all that portion not held invalid shall remain in full force and effect." Vol. 16B, Vernon's Annotated Texas Statutes, pp. 407-417 (1962).

The district court and the majority opinion of the Supreme Court of Texas construe Section 12 in narrow

isolation as prohibiting the Railroad Commission of Texas from fixing a ceiling on a gas reservoir production allowable *in any amount less than the total amount which can be sold from the reservoir for lawful end uses* even though a lower maximum ceiling was admittedly necessary to protect Petitioners' correlative rights to gas in the common reservoir from violation by Respondents and in order to prevent the confiscation of vast quantities of Petitioners' gas by Respondents through tremendous drainage of gas from under Petitioners' lands.

Petitioners contend that the statute as so construed and applied to them in this case denies to Petitioners the equal protection of the laws and results in the taking of Petitioners' property without compensation and without due process of law, and such statute as so construed and applied in this case therefore violates the Fourteenth Amendment to the Constitution of the United States, i.e., the provision of Section 1 thereof reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The Appling Field contains ten producing gas sands or separate gas reservoirs overlying one another (Tr. 230, 39).* The Railroad Commission of Texas has permitted

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* Transcript references used throughout are to the pages of the transcript prepared by the state district court clerk and forwarded to the Texas Supreme Court, which transcript has now been certified as Record item 12 in accordance with the rules of the United States Supreme Court for purposes of filing with this Petition for Writ of Certiorari.

Respondents to drill numerous gas wells penetrating the separate gas sands in the field on tiny town lot tracts averaging less than one acre and most of them being approximately one-tenth of an acre in size. Petitioners' wells are located on adjoining large tracts of several hundred acres in size. In addition to permitting Respondents to drill numerous town lot wells on these tiny tracts as exceptions to the general spacing pattern required by Railroad Commission Rule 37, which generally requires units of 320 acres in size, each of the separate gas reservoirs has been treated as a separate gas field for proration purposes, thereby allowing Respondents to make multiple separate completions in the different sands from single well bores and allowing Respondents separate gas production allowables for each sand.

In an earlier case between substantially the same parties now before the Court and involving these same gas reservoirs in the Appling Field, *Benz-Stoddard* v. *Aluminum Company of America*, 368 S.W. 2d 94 (Tex. 1963), the Supreme Court of Texas held that the Respondents were entitled to make multiple completions from a single well bore in numerous gas sands underlying their town lots even though production from one sand already exceeded the total quantity of gas located in all sands underlying the town lot and even though the gas produced from all sands by the town lot wells was in fact being drained from the lands of Petitioners. Benz-Stoddard in that case was permitted to complete her well in each of the ten reservoirs underlying her .115 acre tract.

In the *Benz-Stoddard* case, the Court recognized the consequent injustice to Petitioners but held out hope of later Railroad Commission relief as follows:

> "We realize that the granting by the Railroad Commission of the multiple completion order under the

> general proration order in effect in the field does create a situation in which grave injustice may be done the respondent . . ."

Then the Court added:

> "It can be seen that the validity of Rule 37 and the exception thereto is based upon the principle that the Railroad Commission can so regulate the flow of the gas that no unreasonable hardship need result from its application. This court reiterated this principle in Atlantic Refining Company v. Railroad Commission of Texas, 162 Tex. 274, 346 S.W. 2d 801, and Halbouty v. Railroad Commission of Texas, Tex. [sic] 357 S.W. 2d 364." 368 S.W. 2d at 98.

In the *Atlantic* and *Halbouty* cases cited in the above quotation from *Benz-Stoddard*, the Supreme Court of Texas had held that the Railroad Commission's ⅓-⅔ gas production allocation formula, under which the monthly gas reservoir production allowable fixed by the Railroad Commission was prorated among the large tract owners and the town lot owners having well completions in the reservoir on the basis of ⅓ to the individual wells and ⅔ in accordance with acreage, resulted in the unlawful confiscation of gas belonging to the large tract owners. This appropriation and conversion by the town lot owners was therefore held unlawful and void. This holding was reiterated in *Railroad Commission of Texas* v. *Shell Oil Co.*, 380 S.W. 2d 556 (Tex. 1964).

The rationale of these holdings is that the ⅓-⅔ allocation formula contained in the Railroad Commission regulation is void because it results in confiscating the property of the large tract owners and appropriating it to the use of the town lot operators and thereby takes the property of the large tract owners without due process of law and denies them the equal protection of the laws in violation of

the provisions of the Fourteenth Amendment to the Constitution of the United States. The rationale of these decisions is stated by Hardwicke & Woodward in *"Fair Share and the Small Tract in Texas"*, 41 Texas L. Rev. 75, 80, as follows:

> "It is invalid because it results in the taking or confiscation of property of Smith and giving it to another without due process of law. Besides denying due process of law, such an order denies equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution, and to the provisions of Article I, Sections 3 and 19 of the Constitution of Texas."

The authors further state the principle at 41 Texas L. Rev. 83 as follows:

> "It follows that the Legislature in Texas cannot validly legislate to authorize confiscation of property, or take away, or authorize an administrative agency to take away, for the benefit of another, rights inherent in ownership of land or oil, gas, or other minerals. These rights, subject to reasonable regulation to prevent waste, are protected by state and federal constitutions. Of course, the right of condemnation exists if the property is for the use of the public and if compensation is paid; *but there is no right by statute, or regulation under a statute, to take the property of one person and give it to another.*"

The ⅓-⅔ allocation formula in effect under the Railroad Commission rules applicable to the Appling Field has always resulted in and continues to result in the confiscation of vast quantities of Petitioners' gas and its appropriation to the use of Respondents. Accordingly, in still another earlier action between substantially the same parties now before this Court and involving these same gas reservoirs, these Petitioners attacked the validity of the

allocation formula on the basis of the *Atlantic* and *Halbouty* cases and on the basis of what had been said in the *Benz-Stoddard* case. While finding that great quantities of Petitioners' gas were being confiscated by Respondents and converted to their own use, the Supreme Court of Texas nevertheless held that Petitioners "were precluded by lapse of time" from attacking the admittedly confiscatory and otherwise invalid allocation formula under which Respondents were admittedly draining and confiscating large quantities of Petitioners' gas. *Railroad Commission* v. *Aluminum Company of America*, 380 S.W. 2d 599 (Tex. 1964). In so holding, the Texas Supreme Court said in part:

> "The grounds of the attack are that this order results in and permits enormous drainage to town lot and other small tract wells from under Respondents' lands and that this drainage will continue unless the Commission's order is set aside. Alcoa et al assert that they own approximately 3,700 acres of the total productive area of the Middle Kopnicky reservoir and as of June 30, 1961, had 22 wells producing therefrom; that at the same time there were 30 town lot wells with total assigned area of 25 acres; that the average per well allowable for the small tracts is 43 times the average per acre allowable for the standard unit tracts in the Middle Kopnicky. *These allegations are proven without substantial dispute* . . . .
>
> "The Appling Field consists of 10 separate sands for the most part overlying one another. All of these sands produce gas and condensate with a few small oil reservoirs interspersed. The principal sand known as the Middle Kopnicky is the deepest producing sand and by far the thickest and most prolific reservoir. It contains 80% of the gas reserves in the entire area. The nine other sands are progressively higher and overlie the producing area of the Middle Kopnicky . . . ." 380 S.W. 2d at 600. (Emphasis supplied.)

The Middle Kopnicky gas reservoir referred to in the quotation immediately above is the deepest and by far the largest and most productive reservoir in the Appling Field; it originally contained more than 360 billion cubic feet of gas. The Middle Kopnicky and four overlying reservoirs are the five reservoirs covered by the Railroad Commission's order invalidated by the Supreme Court of Texas and here in issue. These four overlying reservoirs originally contained only between three and four and one-half billion cubic feet of gas. Petitioners' leases cover more than 85% of the productive area of the Middle Kopnicky and approximately 90% of the productive area of the other four reservoirs (Tr. 231, 32). Respondents hold leases on only infinitesimal parts of the productive area of these five reservoirs (Tr. 77).

Despite these facts Respondents were enabled to continue their confiscation of Petitioners' gas by this earlier decision barring Petitioners from attacking the allocation formula because of their delay in instituting suit. Since this decision the confiscation of Petitioners' gas has been enormously increased by the development of two new facts:

(1) Respondents, through the well connections in totally depleted, overlying reservoirs in their multiple completion wells, fraudulently drained and converted Petitioners' Middle Kopnicky gas by means of well bore communication between the underlying Middle Kopnicky Reservoir and the overlying depleted reservoirs; and

(2) This enabled Respondents to make Producers' Forecasts to the Railroad Commission based on the total producing capacity of their town lot wells even though gas could be produced at these capacities from these town lot wells only by draining and converting gas from the larger and higher pressure Middle Kopnicky Reservoir and pro-

ducing the same through Respondents' well completions in the overlying and depleted reservoirs (Tr. 233, 35).

The monthly reservoir allowables fixed by the Railroad Commission for these reservoirs on the basis of the entire total of all Producers' Forecasts resulted in individual well allowables to wells on the large tracts in excess of their productive capacity and in excess of the productive capacity of any other well in the field, with such excess under the Railroad Commission's field rules being assigned to the Respondents' town lot wells, thereby permitting them to drain still greater quantities of Petitioners' gas. For example, the Appling Field Segment 5, 7500' Field, in July 1964, had 18 wells completed therein, including 17 town lot wells of Respondents located on a total acreage of 7.132 acres and one large tract well of Petitioners situated on a 328 acre unit. The aggregate reported delivery capacity of all 18 wells was approximately 898,000 MCF per month and, due to the Producers' Forecasts made by Respondents at the maximum producing capacity of their wells, a total allowable of approximately 880,000 MCF of gas was determined to be the "lawful market demand" and hence the reservoir gas allowable for the field for the month of July 1964. The ⅓-⅔ allocation formula resulted in an allowable to Petitioners' large tract well of 591,000 MCF per month which was *more than three times the maximum producing capacity of any well in the field.* 530,000 MCF of gas that this large tract well was unable to produce was allotted under Commission procedure to Respondents' 17 town lot wells, enabling them to confiscate and convert to their own use that amount of Petitioners' gas in a single month! (Tr. 65)

This 530,000 MCF of gas was produced by Respondents not *from* the Appling Segment 5, 7500' Field, for which the allowable was granted but which had long since been

completely depleted, but *from* the Middle Kopnicky reservoir *through* the Appling Segment 5, 7500' Field reservoir by means of well bore communication through which the latter drained gas from the former!

Petitioners could not protect themselves from this plundering of their gas reserves by drilling additional wells on their acreage because the Railroad Commission Rule 37 limited them to one well on each 320 acre unit. Ironically, Respondents were granted drilling permits under exceptions to Rule 37 that allowed them to drill gas wells on their 1/10 acre town lots in order to prevent the "confiscation" of their gas. Petitioners could not obtain relief from the pillaging of their property by petitioning the Railroad Commission for modification of the ⅓-⅔ allocation formula governing individual well allowables, e.g., converting to a straight acreage basis or a reduced percentage to the well and an increased percentage to the acreage, because the ⅓-⅔ allocation formula had been judicially frozen against Petitioners by the Texas Supreme Court decision in *Railroad Commission* v. *Aluminum Company of America*, 380 S.W. 2d 599 (Tex. 1964). Petitioners' only recourse was to seek an order from the Railroad Commission placing some rational ceiling on the ghastly inflated monthly reservoir allowables. Petitioners sought this relief by petition to the Commission.

Finding that the ⅓-⅔ allocation formula was being irrationally distorted and in effect nullified, and that the Respondents' town lot wells were receiving far more than the share of the reservoir allowable they should have received even under the ⅓-⅔ allocation formula, which was already so confiscatory as to be invalid, the Railroad Commission entered an order to reduce the distortion in reservoir gas allowables and to minimize the confiscation of Petitioners' gas by setting the maximum limit on the month-

ly gas allowable for each reservoir in such an amount that if the well with the highest productive capacity in the reservoir were situated on the largest tract, it could produce the individual well allotment which it would receive under the ⅓-⅔ allocation formula (Tr. 72-75).

Respondents as plaintiffs and intervener plaintiffs filed this action to invalidate and to enjoin the enforcement of this order against the Railroad Commission of Texas as defendant. Petitioners intervened as parties defendant (Tr. 29, 89, 96, 153, 283). Petitioners and the Railroad Commission of Texas filed a motion for summary judgment (Tr. 40), which motion was overruled by the district court, to which order and ruling Petitioners and the Railroad Commission of Texas duly excepted (Tr. 169). Respondents filed a motion for summary judgment (Tr. 172), which the Railroad Commission of Texas and the Petitioners answered on the law and on the facts supported by affidavits (Tr. 230, 233, 239, 252).

Petitioners and the Railroad Commission of Texas predicated their motion for summary judgment upon allegations of and upon detailed factual affidavits establishing the confiscation of vast quantities of Petitioners' gas by Respondents through well bore communication, through making producers' forecasts for and receiving individual well allotments for reservoirs in multiply completed wells which in fact had long since been completely depleted, and through the reallocation to Respondents of the amounts of the individual well allocations given Petitioners' wells which were in excess of the maximum productive capacity of those wells. Again in answer to Respondents' motion for summary judgment Petitioners and the Railroad Commission of Texas filed a pleading which described the facts of confiscation of Petitioners' gas which justified and formed the basis for the Railroad Commission order under

attack and described in detail the accompanying affidavit proof of the facts of this confiscation. The answer to Respondents' motion for summary judgment alleged in summary:

> "These affidavits show the tremendous confiscation of Alcoa, et al's, gas which was taking place when 'reasonable market demand' was being determined under Statewide Rule 31. The instant Order is a special field rule designed to correct that situation." (Tr. 227)

Extracts from the affidavit proof of the facts of confiscation are printed herewith as Appendix H.

Respondents' motion for summary judgment was granted by the District Court with final judgment being entered decreeing that said ruling and order of the Railroad Commission was null and void and illegal, and was thereby set aside, and the Railroad Commission was permanently enjoined from enforcing or attempting to enforce said order (Tr. 288). From this judgment the Railroad Commission and Petitioners perfected a direct appeal to the Supreme Court of Texas (Tr. 295). In their briefs in the Supreme Court of Texas the Railroad Commission and the Petitioners developed and argued the facts of confiscation of Petitioners' gas and its appropriation to Respondents' use which occurred under the Railroad Commission's prior order (Statewide Rule 31) and which created the basis justifying and supporting the corrective order under attack. The most pertinent extracts from the affidavits proving the facts of confiscation were reproduced in the appendix to Petitioners' brief in the Texas Supreme Court.

The majority opinion of the Supreme Court of Texas found *the confiscation of Petitioners' gas in vastly increased amounts prior to the Railroad Commission's corrective order to be a fact,* but it nevertheless held that under Section 12 of Article 6008 the Railroad Commission was without power to accord any protection to the Petitioners' correla-

tive rights or to reduce the confiscation of Petitioners' gas in fixing monthly reservoir allowables. It held in essence that the Railroad Commission was required to fix the monthly reservoir allowable or "the lawful market demand" at the total amount of gas that could be sold from the reservoir during the month for lawful end uses even though this resulted in, and such "lawful market demand" could only be satisfied by, the drainage and confiscation by well bore communication and otherwise of Petitioners' gas and its appropriation to the use of respondents.

The majority opinion, at 405 S.W. 2d 313 (Appendix D, p. 9a), found the fact of increased confiscation of Petitioners' gas as follows:

> "The small tract wells have delivery capacities similar to those of the wells located on large tracts. A 1961 study disclosed that drainage was taking place from the Middle Kopnicky to the smaller upper zone sands through well bore communication in the wells with multiple completions. This well bore communication distorted the producing capability of the upper zone well completions and thus enabled the operators to file forecasts far in excess of what the true delivery capacity of the wells would have been in the absence of such communication. It had that effect because, as pointed out above, the amounts of the forecasts are limited only by the delivery capacities of the wells.
>
> "*The 1/3-2/3 allocation formula in itself gave the small tract wells a tremendous drainage advantage over the larger gas units.* Prior to the adoption of the order now in question, the Commission determined that operators of many wells on small tracts were following the practice of filing forecasts at or near the full delivery capacity of their wells. These forecasts, when combined with those filed by other operators and handled in accordance with the usual Commission procedure outlined in Statewide Rule 31, resulted in the assignment of very large reservoir allowables. The

> reservoir allowables were so great that the large tract wells, even though they had normal or even maximum delivery capacities, were incapable of producing the allowables representing their fair share of the gas as determined by the allocation formula. They were accordingly classified as limited capacity wells and assigned the maximum allowables they were capable of producing; the remainder of the allowables to which they were entitled under the allocation formula was reallocated among the town lot wells. This enabled the latter to produce *far more of the reservoir allowable than their share as determined by the basic ⅓-⅔ allocation formula, and the drainage advantage which the small tract operators already enjoyed by virtue of the formula itself was thus substantially enhanced.*" (Emphasis supplied.)

As the dissenting opinion of Justice Hamilton so forcefully puts it:

> "The Court's opinion graphically sets out the mass confiscation of property and the gross injustice that results from an enforcement of Rule 31 prior to the amendment that is under attack here." (App. F, p. 32a).

Petitioners and the Railroad Commission of Texas pointed out in their motion for rehearing in the Texas Supreme Court that there could not be a more graphic description of the unconstitutional confiscation of Petitioners' gas without compensation and without due process of law and of the denial to Petitioners of the equal protection of the laws than set out in the above quoted extract from the majority opinion. In their motion for rehearing and in a supplemental brief in support of such motion the Railroad Commission and the Petitioner made and developed the point that the construction of Section 12 of Article 6008 as requiring the Railroad Commission to fix "lawful market demand" and the monthly reservoir allowable in a manner and in such amounts as resulted in and required this confiscation neces-

sarily rendered the statute as construed and as applied violative of the due process and equal protection clauses of Amendment 14 to the Constitution of the United States.

Prior to the majority opinion of the Supreme Court of Texas handed down on June 22, 1966, there had been no fact finding of confiscation as described above coupled with a construction of Section 12 of Article 6008 as not only permitting but requiring such confiscation. It was the first such finding and construction, made casually and without constitutional qualm, in this case or in history. Hence, the motion for rehearing in the Supreme Court of Texas was the first occasion and the first opportunity for the full development of the patent unconstitutionality of Section 12 of Article 6008 under such fact findings coupled with such construction and application of the statute. (Motion for Rehearing is Record Item 8.) In that motion the second point of error was:

> "Section 12 of Article 6008 as construed and applied by the majority opinion is unconstitutional under Article 1, Sections 3 and 19 of the Constitution of the State of Texas and the Fourteenth Amendment of the Constitution of the United States of America in that it denies to Appellants the equal protection of the law and results in the confiscation and taking of the property of Appellants without compensation and without due process of law."

A detailed brief in support of such motion was also filed. (Record Item 10.) The Texas Supreme Court overruled this motion without discussion. (App. C)

Reasons for Granting the Writ

The rather lengthy Statement Of The Case necessary to put the Question Presented before the Court in proper posture and focus has inherent within it the reasons why the

writ should be granted. The finding on uncontroverted evidence in the majority opinion of the Texas Supreme Court that producers' forecasts by Respondents, predicated upon the drainage of Petitioners' gas from the Middle Kopnicky Reservoir by means of well bore communications and the production of that gas through the overlying, totally depleted reservoirs, resulted through the application of the Appling Field rules in individual well allotments to Respondents which enables them "to produce *far more* of the reservoir allowable than *their share* as determined by the basic ⅓-⅔ allocation formula, and the *drainage advantage which the small tract owners already enjoy by virtue of the formula itself was thus substantially enhanced*" is a stark declaration of the taking of Petitioners' property without compensation and without due process of law and of the denial to Petitioners of the equal protection of the laws. The ensuing holding that Section 12 of Article 6008 not only precludes the Railroad Commission from preventing, but requires it to permit, this "drainage advantage" to be "substantially enhanced" is tantamount to a declaration that the statute as so interpreted and as so applied to Petitioners takes their property without compensation and without due process of law and denies to them the equal protection of the laws and hence is unconstitutional in such construction and application under the Fourteenth Amendment to the Constitution of the United States.

The Texas Supreme Court majority held that this monstrous travesty is inexorably compelled by Section 12 of Article 6008 and cannot be averted by the Commission or the courts despite the express mandate in Section 12 that "the Commission shall then proceed by *proper order* to prorate and regulate the gas production from such reservoir *on a reasonable basis*". Proper? Reasonable? The same majority held that the Commission is powerless un-

der Section 12 to consider the protection of Petitioners' correlative rights and the prevention of the admitted gross confiscation of Petitioners' gas in determining the "monthly reservoir allowable" despite the express command of Section 12 that: "The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom *so as to give each well its fair share of the gas to be produced from the reservoir* . . ." Yet the majority opinion expressly finds that its construction of Section 12 gives Respondents *"far more of the reservoir allowable than their share"* and that the *"drainage advantage"* which Respondents *"already enjoy by virtue of the formula itself was thus substantially enhanced"!* Yet this gross and garish miscarriage of justice is given judicial imprimatur as immutable and beyond correction by Commission or court. The majority opinion totally ignores the fact that its construction of Section 12 requires a reservoir allowable *which renders it totally impossible* for Petitioners to receive their "fair share of the gas to be produced from the reservoir". Perhaps this Court cannot heed state court construction so impervious to the express mandate of the state statute. But surely this Court will not ignore a state court statutory construction so oblivious to the denial of equal protection and due process so agonizingly present in its own express language.

Acting directly contrary to the command of this Court's decision in *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), that the courts should accord the Railroad Commission the widest latitude and the broadest discretion in prorating and regulating the production and flow of oil and gas, the majority opinion gives § 12 of Article 6008 a narrow, rigid, mechanistic contruction that precludes the Commission from limiting reservoir gas allow-

ables to amounts of gas *lawfully produced.* The dissenting opinion of Mr. Justice Hamilton states the consequence:

> "In view of this holding of the Court there is no way in which the Commission can protect correlative rights. If Woods Exploration Company and a small pipe line can destroy correlative rights in the reservoirs in question it is unthinkable what larger pipe lines can do to gas fields all over this state wherever there are small tract owners located.
>
> "The Court said in effect that the Legislature gave broad powers to protect correlative rights to the Commission throughout the statutes on oil and gas but took it away with one stroke of the pen when it wrote this one phrase 'shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; * * *'. This in spite of the fact that the Legislature nowhere told the Commission what it must or must not consider in determining lawful market demand. The effect of this holding is to destroy, insofar as gas fields in which there are small tract owners are concerned, the power of the Commission to protect correlative rights. This Court has said numerous times contrary to the present ruling that the Commission has broad powers in so prorating and regulating oil and gas production as to protect correlative rights." App. F, p. 40a.

The majority construction of Section 12 of Article 6008 renders it unconstitutional because, as Mr. Justice Hamilton's dissent puts it, it does not confine Respondents to forecasting and producing "their own gas" but in addition permits them to "produce and sell more than ten times that much more gas belonging to his neighbors" by forecasting and receiving allowables for production of "the gas of other owners, which the producers had no right to offer for sale or to produce".

The United States Supreme Court settled at an early date under the very first Texas oil and gas proration regu-

lations in *Sterling* v. *Constantin*, 287 U.S. 378, 395 (1932), that the right to the use and enjoyment of oil and gas properties "subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction, and waste is protected by the due process clause of the Fourteenth Amendment". It declared that a judicial remedy will be accorded "when there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution". Section 12 of Article 6008 as interpreted and applied by the majority opinion has overridden the private rights of petitioners in the gas belonging to them and located under their lands and it has not done so to prevent waste.

A particularly persuasive precedent is *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55 (1936). The opinion by Mr. Justice Brandeis affirmed a United States District Court judgment holding invalid and enjoining the enforcement of a gas proration order issued by the Railroad Commission of Texas. Pursuant to a Texas statute on the subject, the Railroad Commission had issued a gas proration order limiting the production of sweet gas from the plaintiffs wells to an amount below their marketing requirements under existing contracts, below their existing production, and below the capacity of their transportation and marketing facilities. The plaintiffs owned private pipe lines in which they transported gas produced from their own wells. Their pipe lines were not common carrier pipe lines. There were other gas wells in the field that were not served by pipe lines and had to dispose of their gas for inferior uses. It was found that the Railroad Commission order was not to prevent waste or to protect correlative rights of co-owners in the common reservoir "but solely to compel the plaintiffs, and others similarly situated, to purchase gas from those well owners who have not provided themselves with

a market and marketing facilities". It was further found that the gas lands of the pipe line owner plaintiffs were being drained by the wells of the non-pipeline owners. In holding that the statute and the gas proration order constituted an unlawful taking of plaintiffs' property without due process of law, including the resulting increased drainage of plaintiffs' gas, the court stated in part:

> "The order disables the plaintiffs from performing their contracts except by means of purchases. Resort to those means necessarily results in depriving the plaintiffs of property. Under each statute, if obeyed, the State takes from the pipe line owner the money with which the purchase is made, the money lost through curtailed use of properties developed at large expense, *the money lost because of the drainage away from his land of the gas which he is forbidden to use for himself, but must buy from those toward whose land it migrates.*
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> "Our law presents no more glaring instance of the taking of one man's property and giving it to another." 300 U.S. at 79. (Emphasis supplied.)

It is respectfully submitted that the instant case *does* present a "more glaring instance of the taking of one man's property and giving it to another".

In the *Thompson* case the Court further stated:

> "And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 300 U.S. at 80.

The Supreme Court in that case stated the general rule as follows:

> "But, obviously, the proration orders would not be valid if shown to bear no reasonable relation either to

> the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary." 300 U.S. at 80.

The application of Section 12 of Article 6008 made by the majority opinion so as to protect and perpetuate the "substantial enhancement" of drainage from petitioners' lands and the giving to Respondents of "far more of the reservoir allowable than their share" obviously bears no reasonable relation either to the prevention of waste or to the protection of correlative rights, but on the contrary is utterly destructive of the correlative rights of the petitioners and is totally arbitrary. Hence, as so applied, it is unconstitutional. When Section 12 of Article 6008 is stricken, the validity of the market demand order is clearly sustainable under Sections 1, 10, and 22 of the statute as permitted by the separability clause in Section 26 of the statute. The court stated the applicable principle in the *Thompson* case as follows:

> "Those benefits result incidentally from the enactment of other provisions of the Act, the constitutionality of which is not questioned, and which seem clearly separable from the sections here challenged." 300 U.S. at 81.

The Supreme Court of Texas itself long ago recognized that a Railroad Commission order which permitted one producer's gas to be drained and confiscated by another producer contravened the Fourteenth Amendment to the Constitution of the United States in *Marrs* v. *Railroad Commission,* 142 Tex. 293, 177 S.W. 2d 941 (1944), in which case the Court said:

> "Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation. * * * The Fourteenth Amendment to our Federal Constitution provides that no state

> shall deprive any citizen of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. We need not here determine to what extent the State may confiscate one's property, or deprive him of the use thereof, without compensation, where this is necessary in order to conserve the natural resources of the State. * * * It is sufficient to point out that the trial court here found that the drainage complained of was not necessary in order to avoid waste, and that finding is supported by the evidence. It was further found that the orders of the Railroad Commission were unreasonable, unjust, and discriminatory.
>
> "This Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field." 177 S.W. 2d at 948, 949.

A writ should be granted in this case not only because Section 12 of Article 6008 has been so construed as to permit, or indeed to require, the confiscation of Petitioners' property, but because the decision weakens and disrupts the entire regulatory system applicable to the Texas oil and gas industry which has been reposed in the broad and general discretion of the Railroad Commission since the decision of this Court in the *Rowan & Nichols* case. As Mr. Justice Smith describes it in his dissenting opinion the majority decision "effectively withdraws from the Commission the power granted it by the Legislature to consider correlative rights in establishing a reasonable reservoir allowable" and "the result reached is destructive in that it takes from the Commission every semblance of power that this Court has in past decisions recognized that it possessed" (App. E, p. 20a).

The impact of the majority decision goes far beyond the unconstitutional confiscation of the property of these par-

ticular petitioners because, as Mr. Justice Smith's dissent states, the majority holds "that the Railroad Commission has *no power* to consider the protection of correlative rights or to employ methods designed to see that each individual well gets its *fair share* of the total production from the common gas reservoir in fixing allowables". This drastic narrowing of the powers of the Railroad Commission, contrary to the decision of this Court in the *Rowan & Nichols* case and numerous prior decisions of the Supreme Court of Texas, will permit the confiscation of the gas of large tract owners under Railroad Commission sanction pursuant to state statutory mandate anywhere that large tract owners and small tract owners have wells producing from a common gas reservoir.

Conclusion

The majority opinion bluntly and expressly admits two prior injustices to Petitioners, the first when Respondents were permitted "to make multiple completions from a single well bore" in all gas sands underlying their town lots even though production from a single sand enabled them "to recover more than the quantity of gas" under their land, *Benz-Stoddard* v. *Aluminum Company of America,* 368 S.W. 2d 94 (Tex. 1963), and the second injustice when Petitioners "were precluded by lapse of time from attacking the ⅓-⅔ formula established by the Commission for allocating production from the field, even though using the formula allowed the wells on small tracts to drain substantial quantities of gas from the larger units". *Railroad Commission* v. *Aluminum Co. of America,* 380 S.W. 2d 599 (Tex. 1964).

The majority opinion then expressly finds under the undisputed facts that the subsequent developments of extensive drainage through well bore communication and the

reallocation to Respondents of that part of Petitioners' distorted individual well allowables in excess of their producing capacity enabled Respondents "to produce far more of the reservoir allowable than their share as determined by the basic ⅓-⅔ allocation formula", and that "the drainage advantage" which Respondents "already enjoy by virtue of the formula itself was thus substantially enhanced". The majority opinion makes no contention that Petitioners are "precluded by lapse of time" from attacking confiscation resulting from drainage through well bore communication and from reallocation of distorted allowables since these factors were subsequent developments that were not even before the court in *Railroad Commission* v. *Aluminum Co. of America, supra.* The majority simply holds that Section 12 of Article 6008 precludes the Railroad Commission from protecting Petitioners' correlative rights in fixing reservoir allowables and requires the Commission to fix the amount of the reservoir allowable at the full amount that can be produced and sold from the reservoir during the month for lawful end uses — even though that amount can be produced and sold only by permitting Respondents to produce and sell enormous quantities of Petitioners' gas. This is simply a classic case of construing and applying a statute so as to take Petitioners' property without due process of law and of the denial to Petitioners of the equal protection of the laws.

The impact of this decision upon powers and discretion historically accorded to the Commission and its drastic and far-reaching impact upon the entire gas industry and upon every large tract owner producing from a common reservoir with small tract owners warrant the granting of a writ, It is further warranted in vindication of the constitutional rights of these Petitioners to the end that they may not be compelled to endure without remedy yet an-

other, and a third, time an admitted "grave injustice" involving these same Respondents and these same gas reservoirs.

Respectfully submitted,

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October 21, 1966

Certificate of Service

Copies of this Petition for Writ of Certiorari have been mailed, properly stamped and addressed, to Honorable Price Daniel, 810 Brown Building, Austin, Texas, Honorable Levert J. Able, 1001-711 Main Building, Houston, Texas, Honorable William E. York, 1015 Pecan, McAllen, Texas, and Honorable Charles F. Herring, 906 Perry-Brooks Building, Austin, Texas, attorneys of record for the Respondents at their addresses of record.

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Attorney for Petitioners